

NTSB Order No. EA-3806

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 11th day of February, 1993

Respondent .

Federal Aviation Regulations (FAR), 14 C.F.R. Part 91.²

On appeal, respondent contends, inter alia, that the law judge based his decision on insufficient evidence. The Administrator maintains that the evidence supported the enumerated FAR violations and the initial decision should be upheld.

After consideration of the briefs of the parties and the record below, the Board concludes that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order in its entirety. For reasons set forth below, we deny the appeal and adopt as our own the findings of the law judge.³

²Sections 91.75(a) and (b) (now 91.123(a) and (b)) provide:

"§ 91.75 Compliance with ATC clearances and instructions.

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless he obtains an amended clearance. ... If a pilot is uncertain of the meaning of an ATC clearance, he shall immediately request clarification from ATC.

(b) Except in an emergency, no person may, in an area in which air traffic control is exercised, operate an aircraft contrary to an ATC instruction."

Section 91.9 (now 91.13) states:

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

³Respondent filed an appeal brief, to which the Administrator replied. After filing his original appeal brief, respondent then filed a "Supplemental Appeal Brief." The Administrator has moved to strike the supplemental brief as contrary to the Board's Rules of Practice. According to the Board's Rules, a party is entitled to file one appeal brief, after which, under 49 C.F.R. § 821.48(e), "[n]o further briefs

The alleged FAR violations occurred on September 6, 1988, when respondent acted as pilot-in-command of Emerald Air Flight (EAF) 805, a McDonnell Douglas DC9, on a flight from LaGuardia Airport, Flushing, New York, to Watertown, New York. Respondent operated the aircraft, while the first officer was responsible for communicating with air traffic control (ATC). The Administrator alleged, and two air traffic controllers testified, that Emerald Air Flight 805 was cleared to descend from 24,000 feet (FL 240) to FL 210 and that this clearance was acknowledged. The aircraft descended below FL 210 and was approaching FL 200 when it lost standard separation with another aircraft.⁴

According to respondent, EAF805 was cleared to FL 200 and the first officer acknowledged the clearance; however, the radio transmissions were "very bad" that day and he heard transmissions from other aircraft commenting on the poor quality of the communications as well. He stated that the first officer handled the radio for the flight and set the altitude alerter. After the aircraft descended past FL 210, respondent claims, the first officer said, "I think maybe it might have been 210." Transcript (Tr.) at 119. Respondent admitted, however, that he heard the instruction from the controller to descend and that he believed

(..continued)
may be filed, except upon specific leave of the Board upon a showing of good cause therefor." Inasmuch as leave was not obtained, the motion to strike will be granted.

⁴The exact flight level to which EAF805 descended is in dispute. Respondent claims that the aircraft did not go below FL 207, while the controller who tracked the aircraft testified that it descended to FL 204. In either case, standard separation was not maintained with another aircraft operating at FL 200.

the clearance was to FL 200.⁵

Whether respondent actually handled the radio communications is immaterial in establishing that he violated the referenced FARs in this instance because, as respondent admitted, he heard the instructions from ATC. Under the requirements of FAR section 91.29(a), if the transmission from ATC seemed unclear, respondent should have requested clarification before descending below FL 210. See Administrator v. Hahn and Bourke, NTSB Order No. EA-3493 at 5 (1992); Administrator v. Woodward, NTSB Order No. EA-2274 (1986). See also Administrator v. Peretti, NTSB Order No. EA-3647 at 6 (1992) (A reasonable and prudent pilot carefully monitors ATC communications). Respondent was pilot-in-command of the aircraft and, as such, was ultimately responsible for the safe conduct of the flight. It is well-established that the holder of an ATP certificate must utilize the highest degree of care.⁶

It is also respondent's contention that the evidence offered by the Administrator was insufficient to support the law judge's

⁵Respondent stated: "From what I understood the gentleman to say, when he [gave] us an altitude change and a frequency change in the same sentence, that we were cleared to 200." Tr. at 125.

⁶Regarding respondent's contention that the Administrator treated him unfairly by charging him with the FAR violations but not charging the first officer, we have addressed this insupportable argument before, most recently in Administrator v. Heidenberger, NTSB Order No. EA-3759 at 8-9 (1993). It is not the function of the Board to critique the prosecutorial discretion of the Administrator. Whether or not charges were filed against the first officer has no bearing on the merits of the charges in this case. See Administrator v. Greiner, 1 NTSB 874, 877 (1970).

findings. Again, we must disagree. The factual determinations made by the law judge, namely, that: 1) ATC cleared Flight 805 to descend to FL 210 and this instruction was acknowledged; 2) contrary to this instruction, the aircraft descended to approximately 20,400 feet; and 3) a loss of standard separation occurred, are supported by evidence in the record. The air traffic controller who was communicating with EAF805 at the time the loss of separation developed testified that he cleared the aircraft to descend from FL 240 to FL 210, instructed the aircraft to contact the next frequency, and then heard the instruction acknowledged. He further stated that he observed the aircraft leaving its assigned altitude, which then effected a loss of standard separation with another aircraft. The Administrator introduced a statement of the controller recorded on the day of the incident that completely corroborated this testimony.

The controller who accepted the hand-off detailed by the previous witness then testified that she observed EAF805 descending below FL 210. In order to avoid a potential conflict, she instructed the other aircraft to "expedite his descending flight level to 190." Tr. at 39. She testified that when EAF805 contacted her, she questioned the radio operator as to what his assigned altitude was and he replied that he "was not sure if it was 210 or 200." Tr. at 43. He then confirmed that he did descend below FL 210. Also admitted into evidence was a statement made by this controller on the day of the incident that

was consistent with her testimony.

Respondent additionally claims that the Administrator's case against him is faulty because the tape of the tower communications with EAF805 was not offered into evidence by the Administrator.⁷ This argument too must fail. There is no requirement that the tower tape be utilized in the Administrator's case in chief against a respondent. The testimony and statements of the air traffic controllers adequately support the law judge's conclusion that a preponderance of the evidence shows that the respondent violated FAR sections 91.75(a) and (b) and 91.9.

Respondent asserts that he was prejudiced by the Administrator's use of two items at the hearing that were not made available during discovery. One document, an air traffic display, was utilized by a witness to depict the aircraft's flight path. The other was a letter sent by the FAA to respondent to inform him that the incident was under investigation. The contents of these documents were not a surprise to respondent. These two items were not admitted into evidence and were not material to the law judge's resolution of the case. Thus, the use of these items did not prejudice respondent.

Regarding sanction, respondent argues that he is "entitled to a mitigation of any sanction" because, he claims, ATC

⁷Due to some sort of technical malfunction, the tape produced only a buzzing sound when played.

mishandled the communications. As we made clear in the preceding discussion, this claim is insupportable. A 30-day suspension is consistent with precedent and will be upheld. See Administrator v. Rossini, NTSB Order No. EA-2701 (1988); Administrator v. Bryson, 5 NTSB 1421 (1986).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order and the initial decision are affirmed.
3. The 30-day suspension of respondent's airman certificate shall begin 30 days after service of this order.⁸

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁸For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).